

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

VENELLA RUSSELL

PLAINTIFF

VS.

CAUSE NO. 3:97CV006-D-A

NEW YORK LIFE INSURANCE COMPANY
and WILLIE WRIGHT, JR.

DEFENDANTS

MEMORANDUM OPINION

This cause comes before the court upon the motion of defendant Willie Wright, Jr. to dismiss the complaint against him pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. The plaintiff has responded and this motion is ripe for determination. After thoroughly reviewing the record and the Amended Complaint, the court is of the opinion that the defendant's motion is not well taken and shall deny it.

FACTUAL BACKGROUND¹

Defendant Willie Wright, Jr. was an agent of defendant New York Life Insurance Company ("New York Life") throughout the relevant time in question concerning this cause of action. On November 8, 1994, Wright sold the plaintiff a life insurance policy on her life and the life of her husband, Joe Hanner Russell. While Wright filled out Ms. Russell's insurance application, she informed him that her husband had suffered from liver problems in the past.

¹In ruling on a motion to dismiss, the court must take as true the well-pleaded allegations in the complaint, and construe them in the light most favorable to the plaintiff. Truman v. United States, 26 F.3d 592, 594 (5th Cir. 1994). The court's recitation of the facts of this case reflects this rule.

Wright made a material representation to Ms. Russell, with knowledge of its falsity and with the intention that she rely upon it in entering the contract, that her husband's liver history would present no obstacle to obtaining coverage. Ms. Russell reasonably relied upon Wright's misrepresentation, because of his actual or apparent authority as a New York Life insurance agent, and entered into an insurance contract with New York Life.

Ms. Russell's husband died and the plaintiff filed a claim for benefits under the insurance policy. New York Life rescinded the policy on February 22, 1996 and proffered as its reason for doing so the medical history of her husband, including his liver problems. In her Amended Complaint, Ms. Russell avers that she fulfilled all conditions required of her by the insurance policy and she is entitled to \$9,825.00 plus interest from the date of her husband's death. Ms. Russell sued Wright and New York Life for compensatory and punitive damages. This motion to dismiss followed.

LEGAL DISCUSSION

I. STANDARD EMPLOYED FOR MOTION TO DISMISS

~~Rule 26(b)(6) misfavoring defendant~~ Chk Amended
~~Cv 91-2857 (LC 1986)~~ See Conman 64-2319-86 (LC 1981)
~~Inking from misreading Rule 26(b)(6) to accept the~~
~~to be placed fully in complaint~~ CCP Ltd Dam Per Mortgage
~~Cv 91-2857 (LC 1986) Taking from complaint of~~
~~apparent plaintiff approval of fact would be belief~~
~~is a dismissal proper~~ thus pay on duty plaintiff approval

stated in Whitcomb v. Latta

Campbell & San

Am. 1339/3756 (1995) (en banc) However,

complaints and grievances may not be necessary to

cover a grievance for which an employee is not

the employee's grievance.

Practice & Procedure: Civil 2d 1216, pp. 156-59).

On the other hand, it is not necessary to

in DeVall v. Meis

Schaefer v. Rols 416 S.2d 238 (1983), 66

40 Ed.2d 974 (1974) and Parsons v. Ford 401

U.S. 1000 (1970) and Comp. & Gen. Serv.

Ch. 79-1290

Board of Civil Serv. Comm.

78-1792

(1984) and Comp. & Gen. Serv.

Ch. 79-1290

Comp. & Gen. Serv.

Comp. & Gen. Serv.

Comp. & Gen. Serv.

Comp. & Gen. Serv.

Comp. & Gen. Serv.

Comp. & Gen. Serv.

(1980), Comp. & Gen. Serv.

Comp. & Gen. Serv.

Comp. & Gen. Serv.

Comp. & Gen. Serv.

may be found in Comp. & Gen. Serv.

Comp. & Gen. Serv.

and Comp. & Gen. Serv.

Comp. & Gen. Serv.

Comp. & Gen. Serv.

Comp. & Gen. Serv.

Comp. & Gen. Serv.

Comp. & Gen. Serv.

Comp. & Gen. Serv.

U.S. 1105.

Furthermore, Rule 12 states that

[C]omplaints and grievances may not be necessary to
cover a grievance for which an employee is not
the employee's grievance.

Fed.R.Civ.P.12(b)(6) even has its own definition of a public

record making 12(b)(6) motions'

Davis 1986M6291#7

not going Chadwick 153 F.3d 338, 346 (5th Cir. 1994) even though

affirming the present court's judgment in its

summary judgment if it does not rely upon such documents.

II. WHICH COMPLAINT IS AT ISSUE

The court notes that in his memorandum brief in support of his motion to dismiss, Wright addresses the factual allegations set out in the plaintiff's original complaint. See Mem. In Supp. Of Def., Willie Wright's Mot. To Dismiss ("Wright Mem."). As noted in the plaintiff's response, however, the plaintiff filed an Amended Complaint prior to the filing of any responsive pleading by either defendant.² Mem. In Opp. To Def. Willie Wright, Jr.'s Mot. To Dismiss ("Plaintiff Mem."). As such, it is the Amended Complaint to which the court must look in ruling upon the present 12(b)(6) motion.³ King v. Dogan, 31 F.3d 344, 346 (5th Cir. 1994) (noting amended complaint

²In his rebuttal, Wright argues that the proper complaint to be considered is the original one since he was not served with the Amended Complaint prior to his responsive pleading. Wright Rebuttal, p.1-2. Wright misconstrues the relevant procedural rule. Rule 15 of the Federal Rules of Civil Procedure sets out that "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served." Fed.R.Civ.P.15(a). The record indicates that Ms. Russell filed her Amended Complaint on January 21, 1997. Wright filed his Motion to Dismiss on February 3, 1997 and has not yet filed an Answer. As such, Ms. Russell properly amended her complaint before any responsive pleading was served in this case.

³Wright requests that his motion and supporting memorandum brief be considered as addressing the allegations contained in the Amended Complaint should the court find that the plaintiff properly amended her complaint as to Wright. Since the court has so found, it shall so consider Wright's motion and brief. As an aside, the court notes that Wright's motion to dismiss would have been granted as to the original complaint as the court has already found that the original complaint fails to state any set of facts sufficient to support an award against defendant Wright. Russell v. New York Life Ins. Co., et al., Cause No. 3:97cv006-D-A (N.D. Miss. Feb. 10, 1997) (Davidson, J.) (Memorandum Opinion and Order Denying Motion to Remand).

supersedes original complaint).

III. PLAINTIFF'S AMENDED COMPLAINT OVERCOMES 12(b)(6) HURDLE

The main focus of the defendant's motion to dismiss centers on the fact that the complaint fails to allege that Wright was involved in the cancellation or denial of the insurance policy and, even if the complaint could be read to include such a factual assertion, Wright, as an agent for a disclosed principal, incurs no individual liability for the acts or omissions of his principal. Wright Mem., p.3 (citing cases). As noted by the court in its Memorandum Opinion addressing the plaintiff's Motion to Remand, "Mississippi law sets out that an agent for a disclosed principal incurs no personal liability for a breach of duty or contract between the disclosed principal and a third party." Russell, Cause No. 3:97cv006-D-A, Mem. Op., p.4 (footnote omitted) (citing McFarland v. Utica Fire Ins., 814 F. Supp. 518, 521 (S.D. Miss. 1992), *aff'd*, 14 F.3d 55 (5th Cir. 1994); Wheeler v. Frito-Lay, Inc., 743 F. Supp. 483, 486 (S.D. Miss. 1990)).

However, an agent may be independently liable where the third party establishes separate, tortious conduct by the agent. Wheeler, 743 F. Supp. at 486; see also McFarland, 814 F. Supp. at 521 (noting agent personally liable only for conduct rising to level of gross negligence, malice, or reckless disregard for third party's rights). The plaintiff asseverates that she has met her burden in this regard because she has specifically alleged fraud as a cause of action. Wright counters in his rebuttal that even though Ms. Russell may have pled fraud,

Wright is still entitled to a dismissal because the complaint fails to state [a] cause of action as to him individually. Instead of alleging an independent cause of action against Wright, the Complaint simply says th[at] Wright "was acting within the course of his employment when he committed fraud against the plaintiff." If Wright was an agent for a disclosed principal, acting within the scope of that relationship, then he has no individual liability.

Wright Rebuttal, p.2.

The defendant misconstrues Mississippi law. The Mississippi Supreme Court, in American Fire Protection, Inc. v. Lewis, noted that "an individual may be held *jointly* liable with a corporation for a tort he commits as an agent of the corporation." 653 So. 2d 1387, 1391 (Miss. 1995) (emphasis added) (citing Kitchens v. Mississippi Ins. Guar. Ass'n, 560 So. 2d 129, 134 (Miss. 1989)). Although Mississippi law sets out that an agent acting within the course and scope of his

employment for a disclosed principal will not incur personal liability to third parties *in the context of contractual duties*, Mississippi courts have not extended that immunity to include actions based on tort law. New some v. Shelter Gen. Ins. Co., 792 F. Supp. 1022, 1025 (S.D. Miss. 1991) (citing Wheeler v. Frito-Lay, Inc., 743 F. Supp. 483, 486 (S.D. Miss. 1990)). An agent may incur personal liability for his own independent torts, whether or not he is acting within the course and scope of his employment. Id. If the agent is acting within the scope of his employment when his conduct turns tortious, then both he *and his employer* may incur liability for the wrongful actions. Id. (“[U]nder Mississippi law, an insurer may incur liability for the frauds and misrepresentations of its agents made within the scope of their agency for the insurer.”).

However, the Mississippi Supreme Court muddied the waters a bit in this context in a 1991 case styled Bass v. California Life Ins. Co., 581 So. 2d 1087, 1090 (Miss. 1991). In that case, the high court made the sweeping statement that “while ‘adjusters, agents or other similar entities,’ should not be held liable for ordinary negligence in performing their duties, they can ‘incur independent liability when [their] conduct constitutes gross negligence, malice, or reckless disregard for the rights of the insured.’” New some, 792 F. Supp. at 1026 (quoting Bass, 581 So. 2d at 1090). As such, it appears that the court raised the standard under which an agent may be held personally liable in tort and excluded individual liability based on mere negligence. If that is indeed the holding in Bass, the undersigned is unsure of the reasoning underlying such a distinction between torts. The general analysis justifying imposition of personal tort liability upon agents is that

From the standpoint of a person injured by the wrongful act of another, the relationship of principal and agent is immaterial, and the status of the wrongdoer in that connection of no consequence. This is for the reason that the tort liability of the agent is not based upon the contractual relationship existing between the principal and agent, but upon the common-law obligation that every person must so act or use that which he controls as not to injure another. . . . Thus, whether he is acting on his own behalf or for another, an agent who violates a duty which he owes to a third person is answerable to the injured party for the consequences. It is no excuse to an agent that his principal is also liable for a tort, inasmuch as the rights of a principal and agent inter se do not measure the rights of third persons against either of them for their torts

3 Am.Jur.2d Agency § 309 (1986); see also Leitch v. Homsby, 935 S.W.2d 114, 117 (Tex. 1996); Babic v. Berg, 666 So. 2d 943, 943 (Fla. App. 1995); Inter-Connect, Inc. v. Gross, 644 So. 2d 867,

869 (Ala. 1994) (“The reason for finding personal liability is that the agent personally has committed a wrong, independent of the principal’s wrongdoing.”); DCA Architects, Inc. v. American Bldg. Consultants, Inc., 417 S.E.2d 386, 388-89 (Ga. App. 1992). If an agent may be held personally liable because he has committed a personal wrong, a holding arbitrarily extending immunity to an agent when the claimed personal wrong is negligence would seem to be a flawed one.

Even in light of the Bass decision and its possible ramifications, however, this court cannot conclude that the plaintiff has failed to state a claim against Wright. She has alleged that he made intentional, fraudulent misrepresentations to her upon which she reasonably relied in executing the subject insurance policy. The court is of the opinion that such allegations raise the specter of conduct constituting gross negligence, malice, or reckless disregard for the rights of the insured plaintiff. New some, 792 F. Supp. at 1026 (citing Independent Life & Accident Ins. Co. v. Peavy, 528 So. 2d 1112, 1115 (Miss. 1988) (agents’ misrepresentations which “lulled [insured] into believing his benefits would remain available . . . constituted either an intentional wrong or such gross negligence as to evidence reckless disregard for [insured’s] rights”)). The plaintiff’s Amended Complaint states a cause of action against Wright individually and his motion to dismiss must be denied.

A separate order in accordance with this opinion shall issue this day.

THIS ____ day of February 1997.

United States District Judge

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ORDER DENYING DEFENDANT'S
MOTION TO DISMISS

Pursuant to a memorandum opinion issued this day, the court upon the consideration of the Motion to Dismiss filed by defendant Willie Wright, Jr. finds the motion not well taken and shall deny it. Therefore it is ORDERED that:

) the Motion to Dismiss filed by defendant Willie Wright, Jr. is hereby DENIED.

SO ORDERED this ____ day of February 1997.

United States District Judge